FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

August 31, 2016

Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE MARK STANLEY MILLER and JAMILEH MILLER, Debtors.	BAP No. CO-16-002
MARK STANLEY MILLER and JAMILEH MILLER, Appellants, v. DOUGLAS B. KIEL, Chapter 13 Trustee, DEUTSCHE BANK NATIONAL TRUST COMPANY, and ARAPAHOE COUNTY PUBLIC TRUSTEE, Appellees.	Bankr. No. 15-23599 Chapter 13 ORDER DISMISSING APPEAL

Before **CORNISH**, **JACOBVITZ**, and **MOSIER**, Bankruptcy Judges.

JACOBVITZ, Bankruptcy Judge.

Before the Court is the Notice of Appeal of the *Notice of Dismissal of Case* (the "Notice of Dismissal") filed by Appellants Mark and Jamileh Miller (the "Millers").

Because we hold the Notice of Dismissal is not a final order appealable pursuant to 11 U.S.C. § 158(a),[1] we dismiss the appeal for lack of appellate jurisdiction.

I. FACTS AND PROCEDURAL BACKGROUND

The Millers filed a petition for relief under Chapter 13 of the Bankruptcy Code on December 14, 2015—the Millers' second bankruptcy filing in less than six years. The Millers' previous case was dismissed pursuant to § 109(g) because the Millers failed to file an amended Chapter 13 plan by the deadline set by the bankruptcy court.

Based upon the bankruptcy court's docket, the instant case appears to have been a "bare bones" filing. The petition was not accompanied by the Millers' schedules, statement of financial affairs, statement of current monthly income and expenses, and copies of either of the Millers' payment advices or statements concerning pay advices for the sixty day period prior to filing of the bankruptcy case. On December 16, 2015, the bankruptcy court clerk made a docket entry specifically listing which documents required under the Code had not been filed with the petition. Pursuant to §§ 521(a)(1) and (i) and Colorado Local Bankruptcy Rule 1007-7, either payment advices or the Colorado Local Bankruptcy Form 1007−6.1 Statement Concerning Payment Advices (the "Local Form 1007-6.1") (collectively referred to herein as the "Payment Documents") were due on January 28, 2016. Although the Millers filed all the other required documents on January

[1] All future references to "Code," "Section," and "§" are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated. All future references to "Bankruptcy Rule" or "Bankruptcy Rules" are to the Federal Rules of Bankruptcy Procedure, unless otherwise indicated.

28, 2016, the bankruptcy court docket does not reflect that they timely filed the Payment Documents.[2] On February 3, 2016, the Clerk of the bankruptcy court issued a Notice of Dismissal "FOR THE COURT." The Notice of Dismissal stated:

> YOU ARE HEREBY NOTIFIED that pursuant to 11 U.S.C. § 521(i), the above captioned case was missing information required by Section 521(a)(1) when the case was filed and that information was still missing on the 45th day following the filing. As a result, the case was *automatically dismissed pursuant to the statute on the 46th day* following the filing of the deficient case. This case was dismissed as required by Section 521, therefore, the Court does not have the power to reinstate the case.
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> YOU ARE FURTHER NOTIFIED that if neither the payment advices required under Section 521(a)(1)(B)(iv) nor the L.B.R. Form 1007−6.1 Statement Concerning Payment Advices were timely filed, this case is dismissed pursuant to the United States Trustee's Standing Motion to Dismiss, L.B.R. 1017−3, L.B.R. 1007−6 or Section 521(i), as applicable.[3]

The Millers filed a timely appeal of the Notice of Dismissal.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" entered in cases and proceedings referred to bankruptcy judges under § 157 of Title 28 within the Tenth Circuit, unless one of the parties elects to have

[2] On February 16, 2016, the Millers did file two Local Forms 1007-6.1. Jamileh Miller's form indicated that she was not employed, while Mark Miller's form indicated that he had already timely filed his payment advices. However, as we do not have jurisdiction to consider this appeal, we will not consider the merits of the Millers' assertions.

[3] Notice of Dismissal *in* Appellants' App. at 8 (emphasis in the original).

the district court hear the appeal.[4] A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[5] An appellate court "has an independent duty to inquire into its jurisdiction over a dispute, even where neither party contests it and the parties are prepared to concede it."[6] Where a court discovers a defect in its jurisdiction it cannot "ignore the defect; rather a court . . . must raise the matter on its own."[7]

III. DISCUSSION

Generally, an order dismissing a bankruptcy case is a final, appealable order under § 158(a).[8] More specifically, an order dismissing a bankruptcy case for failure to comply with the requirements of § 521(a) is "final for purposes of review."[9] However, in the case before the Court, the Millers filed a Notice of Appeal of the bankruptcy court clerk's Notice of Dismissal. The Notice of Dismissal states the "case *was* automatically

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[4] 28 U.S.C. §§ 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. No party has elected to have the district court hear this appeal.

[5] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Caitlin v. United States*, 324 U.S. 229, 233 (1945)).

[6] *Ries v. Sukut (In re Sukut)*, 380 B.R. 577, 582 (10th Cir. BAP 2007) (quoting *In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1499 (10th Cir. 1994)).

[7] *Wis. Dept. of Corrections v. Schacht*, 524 U.S. 381, 389 (1998) (citing *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)).

[8] *In re Miller*, 383 B.R. 767, 770 (10th Cir. BAP 2008) (citing *Bass v. Parsons (In re Parsons)*, 272 B.R. 735, 746 (D. Colo. 2001)); *In re Svigel*, WY-07-020, 2007 WL 1747117, at *1 (10th Cir. BAP June 18, 2007).

[9] *In re Svigel*, 2007 WL 1747117, at *1 (holding the bankruptcy court's dismissal of case for debtor's failure to file payment advices was a final, appealable order).

dismissed as required by Section 521 . . . ."[10] There is no record on the bankruptcy court docket that the bankruptcy court ever entered a judgment, order, or decree dismissing the bankruptcy case unless the Notice of Dismissal constitutes a judgment, order, or decree. If there is no judgment, order, or decree dismissing the bankruptcy case, then this Court is deprived of jurisdiction over this appeal. Accordingly, the Court is obligated to consider whether the clerk's Notice of Dismissal is a final, appealable judgment, order, or decree to determine whether it has the jurisdiction over this appeal under § 158(a)(1).

The Notice of Dismissal is not an appealable judgment, order, or decree

Federal Rule of Civil Procedure 54(a)[11] provides that "judgment," as used in the Rules of Civil Procedure, "includes a decree and any order from which an appeal lies."[12] This language refers to "any 'final decision' from which an appeal is permitted under [28 U.S.C. § 1291]" as well as "any appealable interlocutory order."[13] "To be a final order or judgment, there must be 'some clear and unequivocal manifestation by the trial court . . . .'"[14] However, there is no rule that prescribes exactly what form a judgment

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[10] Notice of Dismissal *in* Appellants' App. at 8 (emphasis added).

[11] Made applicable to bankruptcy cases by Fed. R. Bankr. P. 7054(a).

[12] Fed. R. Civ. P. 54(a).

[13] 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2651 (3d ed. 2016) (internal citations omitted).

[14] *Goodwin v. United States*, 67 F.3d 149, 151 (8th Cir. 1995) (quoting *Fiataruolo v. United States*, 8 F.3d 930, 937 (2d Cir. 1993)); *accord Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 385 n. 6 (1978) (to confer jurisdiction, courts of appeals must determine whether the trial court intended the judgment to represent final decision in the case).

should take.[15] A judicial determination made in a memorandum decision can be sufficient.[16]

An order suggests a "command, direction, or instruction" or a "written direction or command delivered by . . . a court or judge."[17] An order may encompass a "determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings."[18]

Traditionally, a decree was the result of a suit brought in a court of equity. Prior to a revision of the Federal Rules of Civil Procedure in 1938 actions sounding in law and suits in equity were distinct.[19] As there is no longer a distinction between actions in law and suits in equity, Federal Rule of Civil Procedure 54(a) "in effect, indicates that a

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[15] 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2652 (3d ed. 2016) (explaining a judgment must be embodied in writing but need not be signed by the judge to be effective).

[16] *In re Miller*, 383 B.R. 767, 770 (10th Cir. BAP 2008) (holding jurisdiction was proper where bankruptcy court entered a memorandum decision finding failure to file required documents triggered the § 521(i)(1) automatic dismissal).

[17] *Order*, Black's Law Dictionary (10th ed. 2014).

[18] *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1228 (9th Cir. 2014) (quoting *Order*, Black's Law Dictionary (10th ed. 2009)).

[19] 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2651 (3d ed. 2016) ("Prior to the fusion of law and equity by the civil rules in 1938, a federal court in an equity suit rendered a 'decree' and an action at law resulted in the entry of a 'judgment.'").

judgment at law and a decree in equity are to be treated in the same fashion."[20] Thus, for purposes of 28 U.S.C. § 158(a)(1) a decree also requires a clear and unequivocal manifestation by the court.[21]

Although the judgment, order, or decree mandate of § 158(a)(1) does not require that the judicial decision be made in a particular form, the Notice of Dismissal falls short of the mark. The Notice of Dismissal notifies the Millers that pursuant to § 521(i) the bankruptcy case "was *automatically dismissed pursuant to statute on the 46th day* following the filing of the deficient case."[22] The bankruptcy court neither determined that § 521(i) required dismissal of the case nor commanded, directed, or instructed that the Miller bankruptcy case be dismissed. Through the Notice of Dismissal, the clerk's office only gave notice of what purportedly already occurred. Because no judgment, order, or decree was entered, we lack jurisdiction over this appeal.

Dismissal pursuant to § 521(i) requires a court order

Our lack of jurisdiction over this appeal does not, however, deprive the Millers of any recourse. Considering § 521(i)(1) in the context of other provisions of the Code, dismissal of a bankruptcy case under § 521(i)(1) for failure by a debtor to timely file the information required by § 521(a)(1) requires entry of an order of dismissal.[23] If an order

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[20] *Id.*

[21] *Goodwin v. United States*, 67 F.3d 149, 151 (8th Cir. 1995) (quoting *Fiataruolo v. United States*, 8 F.3d 930, 937 (2d Cir. 1993)).

[22] Notice of Dismissal *in* Appellants' App. at 8 (emphasis in the original).

[23] The Supreme Court instructs:

is entered dismissing the bankruptcy case, the Millers would have the right to appeal such an order.

Section 521(i)(1) provides:

> Subject to paragraphs (2) and (4) . . . , if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case *shall be automatically dismissed effective on the 46th day* after the date of the filing of the petition.[24]

While § 521(i) is not a model of clarity, we must endeavor to interpret its provisions "using well established principles of statutory construction."[25] When read in isolation, the most natural reading of the language of § 521(i)(1) is that dismissal of a case occurs on the forty-sixth day after case commencement, without entry of a court order, when a debtor does not timely file the information required by § 521(a)(1).[26] However, such a

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> Statutory construction . . . is a holistic endeavor. A provision that may seem unambiguous in isolation is often clarified by the remainder of the statutory scheme-because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371 (1988) (citation omitted).

[24] 11 U.S.C. § 521(i)(1) (emphasis added).

[25] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2073 (2012).

[26] Several courts have adopted this construction of § 521(i)(1). *See In re Tabert*, 540 B.R. 790, 793 (Bankr. D. Colo. 2015) (case is dismissed automatically on the forty-sixth day, regardless of if and when an order pursuant to § 521(a)(2) is entered); *In re Bonner*, 374 B.R. 62, 64 (Bankr. W.D.N.Y. 2007) (section 521(i) neither allows

reading is unreasonable when § 521(i)(1), § 521(a)(1)(B), and subsections (2)-(4) of § 521(i) are considered together. Considering those provisions together, the better construction of § 521(i)(1), although awkwardly expressed, is that if the debtor does not timely file the required information, the court has no discretion but to dismiss the case effective on the forty-sixth day, except as otherwise provided in § 521(a)(1)(B) and subsections (2)-(4) of § 521(i).[27]

Construing §§ 521(a)(1)(B) and 521(i)(1) together

Subsections (i)(1) and (a)(1) of § 521 should be considered and read together. Subsection (i)(1) requires dismissal only if the debtor fails to file all of the information required under subsection (a)(1) within forty-five days after commencement of the bankruptcy case.

Under § 521(a)(1)(B) the debtor must file the documents listed in subsections (i)-(vi) of § 521(a)(1)(B) "unless the court orders otherwise." Nothing in § 521(a)(1)(B)

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discretion in dismissing a case nor provides opportunity to reinstate a case after dismissal); *In re Hall*, 368 B.R. 595, 600 (Bankr. W.D. Tex. 2007) (the clear and unambiguous language in § 521(i)(1) provides that case is automatically dismissed on the forty-sixth day); *In re Fawson*, 338 B.R. 505, 511 (Bankr. D. Utah 2006) (a case is automatically dismissed effective on the forty-sixth day without independent action from the bankruptcy court).

[27] Other courts support this result. *See In re Warren*, 568 F.3d 1113, 1117, 1119 (9th Cir. 2009) (bankruptcy court has discretion to waive the § 521(a)(1) filing requirement after the forty-five day filing deadline); *In re Acosta–Rivera*, 557 F.3d 8, 13 (1st Cir. 2009) (same); *In re Amir*, 436 B.R. 1, 25 (6th Cir. BAP 2010) (bankruptcy courts may waive § 521(a)(1)'s requirements if enforcing the statute would create an abuse of the bankruptcy process); *In re Bliek*, 456 B.R. 241, 244-45 (Bankr. D.S.C 2011) (same). *See also In re Spencer*, 388 B.R. 418, 422 (Bankr. D.D.C. 2008) (the forty-sixth day is the date the court is divested of discretion to deny dismissal for failure to comply with § 521(a)(i), but dismissal is not effective until court enters dismissal order).

states that the court may relieve a debtor of the obligation to file the information only within forty-five days after commencement of the case. Automatic dismissal of the case effective on the forty-sixth day, by operation of law and without a court order, would impose such a limitation. Such a limitation should not be implied because it would produce an unintended result that would allow debtors to abuse the bankruptcy process by intentionally failing to file documents required by § 521(a)(1) to obtain case dismissal to prevent the bankruptcy trustee from administering estate assets for the benefit of creditors. For example, if such a forty-five day time limit were implied, a Chapter 7 debtor could defeat the trustee's sale of nonexempt estate assets or prevent avoidance of transfers to family members simply by choosing not to file one of the documents required by § 521(a)(1)(B)(i)-(vi). Such a result would be contrary to § 707(a), under which a debtor does not have the absolute right to dismiss a Chapter 7 case.[28] To prevent such abuse of the bankruptcy process, courts have interpreted §§ 521(a)(1)(B) and (i)(1) together as giving the bankruptcy court discretion to excuse a debtor from filing documents required under § 521(a)(1)(B), even after expiration of the forty-five day period, to prevent dismissal of the case under § 521(i)(1).[29] Accordingly, dismissal does not occur automatically on the forty-sixth day without a court order.

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[28] Under § 707(a), a debtor must show "cause" to obtain dismissal of a Chapter 7 case.

[29] *See In re Warren*, 568 F.3d at 1113-19 (reading § 521(a)(1) literally would allow "abusive and manipulative debtors to gain automatic dismissal and thereby encourage bankruptcy abuse"); *In re Acosta–Rivera*, 557 F.3d at 13 (strictly reading § 521(i)(1) conflicts with Congress's intent as it would encourage rather than discourage bankruptcy abuse); *In re Amir*, 436 B.R. at 25 (bankruptcy courts may waive

Construing § 521(i)(1) and subsections (i)(2)-(4) together

Subsections (i)(1) and (i)(2)-(4) of § 521 should also be considered together. Construing subsection § 521(i)(1) as providing for automatic dismissal of the case effective on the forty-sixth day, by operation of law and without a court order, would conflict with subsections (i)(2)-(4). Subsections (i)(2)-(4) contain exceptions to automatic dismissal on the forty-sixth day.

Subsection (2) of § 521(i) provides that "any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request."[30] If the case was dismissed on the forty-sixth day of the case for failure of the debtor to file information by the forty-fifth day, without a court order, this provision would make no sense. The request to dismiss cannot be made until the forty-sixth day because only then would there be grounds to assert that the required information was not filed in the first forty-five days. It would be pointless for the court to enter an order dismissing the case after the case had already been dismissed. It is unreasonable to construe subsection (2) as permitting a party to ask

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requirements of § 521(a)(1) if enforcing requirements would create an abuse of the bankruptcy process). *Contra In re Hall*, 368 B.R. 595, 600-01 (Bankr. W.D. Tex. 2007) (case is dismissed automatically even if the debtor desires dismissal because the case has gone badly for the debtor).

[30] 11 U.S.C. § 521(i)(2).

for an order confirming the case was already dismissed. When the Code permits a party to ask for a comfort order, it says so expressly.[31]

Subsection (3) of § 521(i) provides that "upon request of the debtor made within 45 days after the date of the filing of the petition . . . , the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing."[32] Unlike other sections of the Code, subsection (3) does not require that the order extending the period be entered before the forty-five day period expires.[33] It would make no sense for the court to extend the forty-five day period for the debtor to file documents to avoid dismissal of the case after the case had already been dismissed.

Finally, subsection (4) of § 521(i) provides, in part, that on the motion of the trustee filed before expiration of the "period of time specified in [subsection (2)], the court may decline to dismiss the case . . . ."[34] The only period specified in subsection (2)

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[31] *See* § 362(j) ("On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated."). *But see In re Dienberg*, 348 B.R. 482, 483 (Bankr. N.D. Ind. 2006) (the order referenced in § 521(i)(3) is a "comfort order" doing "nothing beyond confirming a state of affairs that already exists.").

[32] 11 U.S.C § 521(i)(3).

[33] *Compare* §521(i)(3) *with* § 365(d)(4)(B)(i) ("The court may extend the period [to assume an unexpired lease of nonresidential real property], prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.") and § 1121(e)(3)(C) (in a small business case, the court may extend periods to file and confirm a plan only if "the order extending time is signed before the existing deadline has expired.").

[34] 11 U.S.C. § 521(i)(4).

is contained in a requirement that the court, subject to subsection (4), "enter an order of dismissal not later than 7 days after such request."[35] The request made under subsection (2) necessarily would be made after expiration of the forty-five day period because the only available ground for the request is failure of the debtor to file information within the forty-five day period. If the case had already been dismissed on the forty-sixth day, the court would be unable to decline to dismiss the case on a timely request made under subsection (4) contrary to the express authorization granted the court under that subsection. [36]

Therefore, to give meaning to subsections (2)-(4) of § 521(i), an order is required to dismiss a case pursuant to subsection (1).

IV. CONCLUSION

Construing § 521(i)(1), subsections (2)-(4) of § 521(i) and § 521(a)(1)(B) together, we interpret § 521(i)(1) as requiring an order of dismissal to dismiss the case. The language "shall be automatically dismissed effective on the 46th day" specifies the time when the court is deprived of discretion not to dismiss, except as otherwise provided in § 521(a)(1)(B) and § 521(i)(2)-(4).

As the Notice of Dismissal is not a judgment, order, or decree of the bankruptcy court, it necessarily is not a final judgment, order, or decree from which an appeal may be

[35] 11 U.S.C. § 521(i)(2).

[36] *See In re Spencer*, 388 B.R. at 421 ("permitting a trustee to file a motion . . . to have the court 'decline to dismiss the case'—would be internally inconsistent with § 521(i)(1) if under § 521(i)(1) dismissal already occurred on day 46.").

taken pursuant to 28 U.S.C. § 158(a)(1). Furthermore, without an order or decree, this Court also cannot grant leave to appeal pursuant to 28 U.S.C. § 158(a)(2).

This Court is a court of "'limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'"[37] Where the Court lacks jurisdiction, it "cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking."[38] Accordingly, this appeal is DISMISSED for lack of jurisdiction.

[37] *Gunn v. Minton*, 133 S.Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

[38] *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015) (quoting *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013)).